§ 727(a)(2)(A) and (B)
§ 727(a)(4)(A) and (D)
Denial of Discharge

Robert K. Morrow, Inc. v. Rencher, Adversary No. 02-3329-elp
In re Rencher, Case No. 301-42314-elp7

08/06/03 ELP Unpub

Memorandum opinion denying the debtor's discharge under § 727(a)(2)(A) and (B) and (4)(A) and (D).

The court denied debtor's discharge under § 727(a)(2)(A) and (B), because debtor transferred rental payments for real property located in Idaho ("the Idaho property") to his father, both before and after the petition date, with the intent to hinder, delay or defraud his creditors and the trustee. The court also denied debtor's discharge under § 727(a)(4)(A), finding that debtor knowingly and fraudulently made at least false oaths in connection with the Idaho property. Finally, the court found that debtor should be denied a discharge under § 727(a)(4)(D), for knowingly and fraudulently withholding a rental agreement for the Idaho property from the trustee.

The debtor was also denied a discharge under § 727(a)(2), for transferring and concealing property within one year of the petition date with the intent to hinder or delay his creditors. Approximately one month before debtor filed his chapter 7 petition, he transferred $125,000 to a newly opened bank account in another state. Debtor admitted in his trial testimony that he moved the funds to prevent the prejudgment attachment of those funds by certain state court plaintiffs. Debtor argued that the movement of funds did not qualify as a transfer under § 727(a)(2)(A), because he retained title to the funds and did not transfer them to a third party. The court rejected this argument.

The court also denied debtor's discharge under § 727(a)(4)(A) for knowingly and fraudulently making material false oaths by failing to disclose several prepetition transfers from his personal checking account. Debtor argued that the omissions were not material, because the transfers ultimately would not have been recoverable by the trustee as preferential transfers under § 547. The court rejected this argument, finding that whether the transfers were avoidable and thus recoverable for the benefit of the estate was for the trustee to decide, not debtor.

Finally, the court denied debtor's discharge under § 727(a)(4)(A) for knowingly and fraudulently making a material false oath when he failed to disclose a closed bank account in his statement of financial affairs.

P03-3(37)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: GUY B. RENCHER, II, Debtor.	Bankruptcy Case No. 301-42314-elp7
ROBERT K. MORROW, INC., Plaintiff, v. GUY RENCHER, II, Defendant.	Adversary Proceeding No. 02-3329-elp MEMORANDUM OPINION

I. Overview

Debtor Guy B. Rencher, II ("debtor") is an attorney who, in addition to practicing law, was involved in numerous business activities, some of which involved raising money from investors. By the time debtor filed his chapter 7[1] petition on December 12, 2001, he was facing multiple lawsuits in connection with his business activities.

[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

Robert K. Morrow, Inc., the chapter 7 trustee ("the trustee"), filed a complaint to deny debtor a discharge under § 727(a)(2)-(6). The pertinent facts will be discussed in detail below in connection with the analysis of the trustee's claims. For the reasons set forth below, debtor's discharge will be denied.

II. Issue

Whether debtor should be denied a discharge under § 727(a).

III. Analysis

The trustee asserts claims under § 727(a)(2)(A) and (B); (3); (4)(A) and (D); (5) and (6)(C). Because this case primarily involves debtor's failure to qualify for a discharge under § 727(a)(2) and (4)(A), I will discuss the elements of those two provisions in detail at the outset. The elements of § 727(a)(3), (4)(D) and (5) will be discussed below as necessary in connection with the factual allegations to which they relate.[2] I will then

---

[2] The trustee also asserts that debtor should be denied a discharge under § 726(a)(6)(C), because debtor refused to disclose the identity of his postpetition accountant until ordered by the court to do so. The trustee has not established that debtor should be denied a discharge under § 727(a)(6)(C).

Section 727(a)(6) states that a debtor will be denied a discharge if

> the debtor has refused, in the case–
>
> . . . .
>
> (C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify[.]

(continued...)

discuss credibility, because it has been a major factor in this proceeding. Finally, I will discuss the claims upon which debtor's discharge will be denied. As I explain below, there are multiple, independent grounds for denying debtor's discharge, even without addressing all of the factual and legal contentions relied upon by the trustee.

A. Overview of Requirements of § 727(a)(2) and (4)(A)

The burden is on the plaintiff in a § 727 action to establish, by a preponderance of the evidence, that a debtor should be denied a discharge. In re Beauchamp, 236 B.R. 727, 730 (9th Cir. BAP 1999), aff'd, 5 Fed.Appx. 743 (9th Cir. 2001)(unpublished; adopting BAP opinion).

---

[2](...continued)
This provision "applies when the debtor refuses to answer 'a material question approved by the court.'" 6 Lawrence P. King, COLLIER ON BANKRUPTCY ¶ 727.09[3] (15th ed. Rev. 2003)(quoting § 727(a)(6)).

> "Court" means a judge, and not simply a trustee, United States trustee or other official. The debtor's refusal to answer a question that has not been approved by the court is not a basis for denial of a discharge. Thus, a refusal to answer questions in a creditors' meeting or a deposition is not grounds for denial of discharge if, when the court subsequently approves the question, the debtor answers it.

Id. Debtor revealed the identity of his postpetition accountant after I entered an order requiring him to do so. Debtor's earlier failure to identify his accountant does not warrant denial of his discharge under § 727(a)(6)(C).

1. Section 727(a)(2)

Section 727(a) provides that the court shall grant the debtor a discharge unless

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition[.]

To deny a debtor a discharge under section 727(a)(2)(A) or (B), the plaintiff must show that (1) debtor transferred or concealed property; (2) the property was property of the debtor (prepetition) or property of the estate (postpetition); (3) the transfer occurred within one year before the bankruptcy was filed (727(a)(2)(A)) or after the petition was filed (727(a)(2)(B)); and (4) debtor acted with the intent to hinder, delay or defraud a creditor or an officer of the estate. In re Devers, 759 F.2d 751 (9th Cir. 1985); In re Aubrey, 111 B.R. 268, 273 (9th Cir. BAP 1990).

The intent to hinder, delay or defraud must be actual, as opposed to constructive intent. Devers, 759 F.2d at 753-54. The requisite intent may be inferred from the actions of the debtor, id., or from the circumstances of the case. In re Woodfield, 978 F.2d 516, 518-19 (9th Cir. 1992). "A continuing pattern of wrongful behavior is one indication of fraudulent intent." 6 Lawrence P. King, COLLIER ON BANKRUPTCY ¶ 727.02[3][b] (15th ed. Rev. 2000)(citing Devers). "Certain 'badges of fraud' strongly suggest that a

transaction's purpose is to defraud creditors unless some other convincing explanation appears." Woodfield, 978 F.2d at 518. Badges of fraud include the following:

1. A close relationship between the debtor and the transferee, id;

2. A transfer in anticipation of a lawsuit, id;

3. The receipt of inadequate consideration, id;

4. "[U]nusual methods of transacting business[,]" In re Titus, 75 B.R. 256, 259 (Bankr. W.D. Mo. 1985)(quoting Allison v. Mildred, 307 S.W.2d 447, 453 (Mo. 1957));

5. A debtor's "failure to produce available explanatory or rebutting evidence when the circumstances attending the transfer are suspicious[,]" Titus, 75 B.R. at 259; and

6. Transfers made immediately before the filing of a bankruptcy petition. 3 NORTON BANKRUPTCY LAW AND PRACTICE 2D § 74:4 (1994).

2. Section 727(a)(4)(A)

Under § 727(a)(4)(A), a debtor's discharge should be denied if the debtor knowingly and fraudulently made a false oath or account in or in connection with his or her bankruptcy case.

> To deny a debtor a discharge under § 727(a)(4)(A), the plaintiff must show that (1) the debtor knowingly and fraudulently made a false oath; and (2) the false oath related to a material fact.

In re Wills, 243 B.R. 58, 62 (9th Cir. BAP 1999).

a. Intent

To deny discharge under § 727(a)(4), "[i]ntent must be actual, not constructive." Id. at 64. As with § 727(a)(2), intent may be inferred from the circumstances of the case and the same badges of fraud discussed above. Id. at 64 n.4. "A court may find the requisite intent where there has been a pattern of falsity or from a debtor's reckless indifference to or disregard of the truth." Id. at 64. See also In re Tully, 818 F.2d 106, 112 (1st Cir. 1987)(A debtor's reckless indifference to the truth "has consistently been treated as the functional equivalent of fraud for purposes of § 727(a)(4)(A).").

b. Materiality

Materiality is broadly defined. Wills, 243 B.R. at 62.

> A false statement is material if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of debtor's property.

Id. A false statement or omission need not cause direct financial prejudice to creditors to be material. While "[a] false statement or omission that has no impact on a bankruptcy case is not grounds for denial of a discharge under § 727(a)(4)(A)[,] . . . an omission or misstatement relating to an asset that is of little value or that would not be property of the estate is material if the omission or misstatement detrimentally affects the administration of the estate." Id. at 63 (citations omitted). An omission detrimentally affects administration of the estate if it "adversely affects the . . . ability to discover other assets or to fully investigate the

debtor's pre-bankruptcy dealing and financial condition." Id. (quoting King, COLLIER ON BANKRUPTCY ¶ 727.04[1][b]).

B. Credibility

A discharge in bankruptcy is a privilege, not a right. In re Cox, 41 F.3d 1294, 1296 (9th Cir. 1994). The privilege of discharge and the resulting benefit of a fresh start are dependent on a full and accurate disclosure of the debtor's financial affairs. Id. "[C]omplete disclosure is the touchstone in a bankruptcy case." In re Bernard, 99 B.R. 563, 570 (Bankr. S.D.N.Y. 1989).

Debtor has fallen far short of providing complete disclosure, and his failure to do so is attributable to a deliberate and concerted effort to withhold information. The number and magnitude of the inaccuracies in debtor's bankruptcy papers are, as the trustee's attorney said during his opening statement, staggering. This is especially true considering that debtor is an experienced attorney and businessman and that he has had the benefit of being represented by an experienced bankruptcy attorney.

Debtor's conduct leading up to trial was marked by a lack of cooperation and obstructiveness. At trial, debtor did not directly answer the questions posed to him. Instead, he testified with calculated evasiveness. When debtor did testify directly as to relevant matters, I often found him not to be credible. I base this finding in part on my observation of debtor's demeanor. In addition, the record includes a particularly egregious example of debtor's dishonesty.

As will be discussed in more detail below, the trustee alleged that debtor should be denied a discharge for certain acts and omissions in connection with two bank accounts.[3] Debtor's position is that neither he nor his wife had actual ownership interests in the two accounts, even though one of the accounts was held in his name and the other in his wife's. Debtor testified at trial that he had never represented that he had an ownership interest in either of the accounts. This, it turns out, was not true. In March and April of 2001, debtor represented that he owned the accounts in connection with two separate, personal loan applications. See Exhibits 64 at 4 (claiming ownership of both accounts); 65 at 11 (claiming ownership of one of the accounts).

Debtor's wife, Meadena Rencher, also testified at trial. I found her credibility to be equally suspect. Mrs. Rencher testified that she had never represented that the funds in US Bank account number 153691137340, which was titled in her name, were her funds. This is not true. Mrs. Rencher signed one of the loan applications in which she and debtor represented that they owned the funds in that account. See Exhibit 65 at 12. I also found Mrs. Rencher's testimony on other points to be evasive, rehearsed and generally unbelievable.

[3] The two accounts are US Bank account numbers 153691612938 and 153691137340.

C. Application of Requirements of § 727 to Trustee's Factual Allegations

1. Idaho Property

In his Schedule A, debtor stated that he owned residential real property in Kooskia, Idaho ("the Idaho property") in joint tenancy with right of survivorship. Exhibit 55.

On July 17, 2002, the trustee conducted a Rule 2004 examination of debtor ("the 2004 exam"). Debtor testified that he bought the Idaho property in 2001 from his father and that he owned the property jointly with his wife. Exhibit 59, 120:18 - 121:9. However, he invoked the Fifth Amendment privilege and refused to reveal the purchase price of the property. Id. at 120:20-22. In his Schedule F, Creditors Holding Unsecured Nonpriority Claims, debtor listed his father, Frank Rencher, as a creditor and stated that the debt owed to his father was for a $129,568 personal loan. Exhibit 55. At the 2004 exam, debtor refused to state whether this debt was based on his purchase of the Idaho property, again invoking the Fifth Amendment. Id. at 121:10-18. Debtor also invoked the Fifth Amendment and refused to state whether the Idaho property was being rented on the petition date. Id. at 127:1. The subject of an entity identified as the Dorado LLC ("Dorado") came up at the 2004 exam. Debtor refused, on Fifth Amendment grounds, to say whether he was a manager of Dorado or whether Dorado assigned a rental

agreement to his father within one year of the petition date.[4] Id. at 136:16-24.

On May 20, 2003, less than two weeks before trial, the trustee deposed debtor. The following exchange between debtor and the trustee's attorney took place at the deposition. I have included a lengthy excerpt, because debtor made several important statements, and because the excerpt illustrates debtor's lack of cooperation and evasive testimony, which have been hallmarks of this case.

> Q. In 2001, you purchased some property from your father in Kooskia, Idaho, correct?
>
> A. I believe so, yes. . . .
>
> Q. Was that property rented at any time during 2001?
>
> A. I don't recall whether it was or not. I mean, I'm not positive.
>
> Q. Has it ever been rented since you've owned it?
>
> A. Yeah.
>
> Q. When was that?
>
> A. I'm not sure when the dates were. I mean, I just don't recall at the moment.
>
> Q. Was it before or after you filed the bankruptcy petition?
>
> A. I honestly don't recall right now. I don't know.

---

[4] The parties disagree in their trial memoranda about the propriety of drawing a negative inference from debtor's refusal to testify based on his invocation of the Fifth Amendment. The Supreme Court has held that a court in a civil matter may, under certain circumstances, draw an adverse inference from a party's refusal to testify on Fifth Amendment grounds. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). I need not decide whether a negative inference would be proper in this case, because there is more than enough evidence to deny debtor his discharge without drawing a negative inference from his invocation of the Fifth Amendment.

Q. Who was it rented to?

A. Oh. I mean, I don't remember their names offhand.

Q. Was there a written lease agreement?

A. I believe there was.

Q. Do you have a copy of that?

A. Not with me.

Q. Do you have a copy of that in your records somewhere?

A. Possibly. Possibly meaning, since filing this bankruptcy, I moved my office twice and so I can't quite as easily put my hands on documents as I could a year ago or [a] year and a half ago.

Q. Is the property currently rented?

A. Yes.

Q. Who gets the payment on that rent?

A. The payment goes to my father.

Q. Why does it go to your father?

A. Because he's the owner of the LLC that is the real party in interest on the property.

Q. I'm confused. I thought you bought the property.

A. I bought the property as a nominee for another entity.

Q. What is the other entity?

A. Dorado LLC.

Q. What kind of arrangement do you have with Dorado LLC?

A. I'm the manager.

Q. And who owns Dorado?

A. As far as I know Frank Rencher does.

Q. When did you transfer your interest in the property to Dorado?

A. I'm holding it as a nominee.

Q. And you've always held it as a nominee?

A. Yes.

Q. Okay. Did you disclose this in your bankruptcy schedules?

A. The bankruptcy schedule says that I own it.

Q. But you're telling me today that you don't own it?

A. I have always considered that - I have legal title to it. Well, as of today, I don't think I have any title anymore. I believe the trustee sale was last week.

. . . .

Q. Did you ever receive any rent payments?

A. I received them on behalf - I mean, the check was made out to me. I want to be clear about that.

. . . .

Q. How much was the monthly rental?

A. It was 500 a month.

Q. And you don't recall when that began?

A. Not today I don't remember.

Q. Were you collecting rent after December 2001?

A. Yes.

Q. Were you collecting rent prior to December 2001?

A. I don't recall if I was or not. I would say probably.

Q. And every time you received a rent check you passed it on to your father?

A. Yes.

Q. Are those transfers disclosed in your schedules anywhere?

A. No, they are not.

Q. Why not?

A. Frankly, I didn't even think about them when we were doing it. I just forgot them.

Exhibit 57A, 50:14 - 54:21.

At trial, debtor testified that there was a rental agreement that started in November of 2001 between him and individuals identified as the Hicks. Debtor admitted that the rental agreement was not disclosed in his schedules or statement of financial affairs, and that it should have been. Debtor's explanation for not disclosing the rental agreement is that he overlooked it. Debtor testified that the rental payments were sent to him at his office, he deposited the payments into the Dorado checking account and then, "generally speaking," the funds were paid to his father on a note owed to his father by Dorado.

As is discussed more fully below, I conclude that debtor should be denied a discharge under §727(a)(2)(A) and (B) and (4)(A) and (D) as a result of his acts and omissions in connection with the Idaho property.

a. Section 727(a)(2)

Debtor's discharge will be denied under § 727(a)(2)(A) and (B), because he transferred rental payments for the Idaho property to his father, both before and after he filed his bankruptcy petition, with the intent to hinder, delay or defraud his creditors and the trustee.

Debtor admits in the pre-trial order ("the PTO") that he transferred rental payments to his father after the petition date. At trial, debtor challenged the trustee's assertion that he

transferred rental payments to his father prepetition, stating that there was no evidence of any such transfers. I disagree.

Debtor testified at trial that he and the Hicks entered into the rental agreement in November of 2001. Given that the rental agreement began in November of 2001, I infer that some payment was made under that agreement before debtor filed his petition in December. Other evidence in the record supports this finding. At his deposition, which is excerpted above, debtor stated that he was "probably" collecting rent payments prior to December 2001. Exhibit 57A, 54:12. Given debtor's history of evasive testimony in this case, I take this as an admission of at least one prepetition transfer. At the deposition, the trustee's attorney then asked why the transfers were not disclosed in debtor's schedules. Debtor stated that he simply forgot about them when he was preparing his petition. If debtor had not collected prepetition rental payments, there would have been nothing for him to forget. Debtor testified at his deposition that every time he received a payment under the rental agreement, he transferred that payment to Dorado and then to his father. Therefore, I find that debtor transferred at least one rental payment to his father via Dorado prepetition.[5]

To deny a debtor a discharge under § 727(a)(2), the property transferred must be property of the debtor, if transferred prepetition, or property of the estate, if transferred postpetition.

---

[5] Even if there was no prepetition transfer of rental payments, debtor admitted that he transferred postpetition rental payments to his father.

I reject debtor's argument that the transfers do not qualify under § 727(a)(2), because he owned the Idaho property only as a nominee for Dorado and, as a result, the rental payments did not belong to him or his estate. Debtor stated that he owned the Idaho property in his Schedule A. He testified that he owned the property jointly with his wife at his 2004 exam. It was not until his deposition, less than two weeks before trial, that debtor first revealed the alleged real nature of his ownership of the Idaho property. Debtor's last minute explanation smacks of desperation, not truth. Debtor provided no independent or documentary evidence that he owned the property as a nominee for Dorado, despite testifying at his deposition that such evidence exists. See Exhibit 57A, 53:15-20. Instead, the only evidence is debtor's self-serving, unsubstantiated testimony, which I do not find credible.

I find that debtor transferred the rental payments with the intent to hinder, delay or defraud his creditors and the trustee. Debtor's transfers of the rental payment to Dorado and his father carry one of the classic badges of fraud: a close relationship between the transferor and the transferee. In this case, the transferees were Dorado, a business entity for which debtor was the manager, and debtor's father. The transfers, when combined with debtor's failure to disclose numerous transactions and facts connected with the Idaho property, which I discuss next, are part of a continuing pattern of wrongful behavior indicating a fraudulent intent to put the rental payments beyond the reach of the trustee and debtor's creditors.

b. Section 727(a)(4)(A)

Debtor will also be denied a discharge under § 727(a)(4)(A), because he knowingly and fraudulently made several false oaths relating to material facts in connection with the Idaho property.

Debtor made at least four false oaths concerning the Idaho property. First, debtor made a false oath when he failed to disclose the prepetition transfer of rental payments to Dorado and his father in response to question 3(b) of the statement of financial affairs, which requires disclosure of all payments made within one year preceding the petition date for the benefit of creditors who were insiders. Both Dorado and debtor's father qualify as insiders under the Bankruptcy Code.[6]

Second, debtor made a false oath at the § 341(a) meeting of creditors ("the 341(a) meeting") held on January 17, 2002. At that meeting, the trustee asked debtor the following question:

> Q In the 12 months prior to the time of filing your bankruptcy did you pay or give any money or anything of value to any friends or relatives other than in the ordinary course of support and/or usual and regular holiday type gifts?
>
> A No.

Exhibit 58, 4:19-24. This was a false statement. Debtor transferred at least one rental payment to his father prepetition.

---

[6] An insider of an individual debtor includes a "relative of the debtor" and a "corporation of which the debtor is a director, officer, or person in control[.]" § 101(31)(A)(i), (ii).

Debtor testified at trial that he entered into the rental agreement with the Hicks in November 2001. As a result, the lease of the Idaho property should have been listed on debtor's Schedule G, which requires disclosure of, among other things, all unexpired leases of real property. Debtor's failure to disclose the rental agreement was his third false oath.

Finally, question 18 of the statement of financial affairs requires an individual debtor to disclose, among other things, all businesses in which the debtor was a managing executive. Debtor testified at the 2004 exam that he was the manager of Dorado, the alleged real owner of the Idaho property.[7] Debtor made a false oath when he failed to disclose that he was Dorado's manager in response to question 18 of the statement of financial affairs.[8]

There is no question that these false oaths relate to material facts. Debtor's false statements are material, because they relate to debtor's business transactions and estate and concern the discovery of assets and the disposition of debtor's property.

---

[7] I have already rejected debtor's claim that he held the Idaho property as a nominee for Dorado. However, even if this were true, debtor made a false oath when he failed to disclose that fact in response to question 14 of the statement of financial affairs, which requires disclosure of property owned by another that the debtor holds or controls.

[8] Debtor's Schedule I, Current Income, discloses monthly income from real property of $500, although it does not specify from what real property. This partial disclosure of information does not insulate debtor from the legal implications of the false oaths discussed above.

I also find that debtor made these false oaths knowingly and fraudulently.

> [M]ultiple omissions of material assets or information . . . support an inference of fraud if the nature of the assets or transactions suggests that the debtor was aware of them at the time of preparing the schedules and that there was something about the assets or transactions which, because of their size or nature, a debtor might want to conceal.

In re Coombs, 193 B.R. 557, 565 (Bankr. S.D.Cal. 1996). Debtor's multiple omissions of material information concerning the Idaho property reveal an intent to obfuscate the true nature of his ownership of that property and secure the rental payments for his father.

Debtor maintains that he simply overlooked the rental agreement and the transfer of rental income in preparing his bankruptcy papers. While an honest mistake is not grounds for denial of discharge, see In re Beaubouef, 966 F.2d 174, 178 (5th Cir. 1992), I do not believe that debtor's omissions are attributable to an honest mistake.[9]

Debtor testified at trial that he entered into the rental agreement with the Hicks in November of 2001. The proximity of that agreement to the filing of debtor's petition makes it unlikely that he simply overlooked it.

---

[9] Even if debtor's failure to disclose the rental agreement and transfer of rental income in his bankruptcy papers and at the 341(a) meeting was attributable to an honest mistake, which I do not believe, debtor offers no explanation for failing to disclose that he was the manager of Dorado.

Debtor also argues in his trial memorandum that the trustee waived his right to assert this claim because the trustee told him at an early, unofficial meeting, that he was going to abandon the Idaho property. I reject this argument for two reasons.

First, debtor did not raise the affirmative defense of waiver in his answer. A defense not raised in an answer is generally waived. Fed. R. Civ. P. 8(c);[10] In re Nat'l Lumber and Supply, Inc., 184 B.R. 74, 79 (9th Cir. BAP 1995). Second, there is nothing in the record to suggest that the trustee intended to waive his § 727(a)(4)(A) claim. In fact, at debtor's 2004 exam, the trustee's attorney specifically told debtor that, even if the Idaho property was abandoned at some point in the future, the trustee intended to pursue claims arising from transactions connected with that property. Exhibit 59, 149:8-11. The trustee did not waive his right to assert a claim under § 727(a)(4)(A) in connection with the Idaho property.

c. Section 727(a)(4)(D)

The trustee also asserts a claim under § 727(a)(4)(D), arguing that debtor should be denied a discharge because he knowingly and fraudulently withheld the rental agreement for the Idaho property. I agree.[11]

---

[10] Fed. R. Civ. P. 8(c) is made applicable to adversary proceedings by Rule 7008.

[11] The trustee also asserts that debtor should be denied a (continued...)

Section 727(a)(4)(D) states that a debtor's discharge should be denied if the debtor knowingly and fraudulently

> withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs[.]

The trustee requested that debtor produce the rental agreement for the Idaho property at the 2004 exam in July 2002. Exhibit 59, 148:1-6. After debtor failed to produce the rental agreement, the trustee served a Request for Production of Documents and Interrogatories ("the discovery request") on debtor on March 14, 2003. Among other things, the trustee requested (1) copies of documents regarding the ownership of the Idaho property and (2) copies of all contracts between Dorado and debtor's father. After debtor's repeated failure to produce documents responsive to the discovery request, or to explain his failure to do so, I entered an

---

[11](...continued)
discharge in connection with the Idaho property under § 727(a)(3), which states that a debtor should be denied a discharge if

> the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]

"'[I]ntent to conceal one's financial conditions is not a necessary element for the denial of discharge under § 727(a)(3).'" In re Cox, 41 F.3d 1294, 1297 (9th Cir. 1994)(quoting In re Wolfson, 139 B.R. 279, 287 (Bankr. S.D.N.Y. 1992)). Because I have decided that debtor knowingly and fraudulently withheld the rental agreement, I need not decide whether he also should be denied a discharge under § 727(a)(3).

order captioned Order Regarding Second Motion for Discovery Sanctions ("the sanctions order"), which provided, inter alia, that

> 1. [Debtor] shall be barred from producing any evidence at the trial on this matter regarding issues that were the subject of the Discovery Request.
>
> 2. [T]he court shall draw all inferences regarding the [debtor's] failure to produce any evidence and any evidence introduced by Plaintiff relating to the subject matter of the Discovery Request in the light most favorable to the Plaintiff and adversely against [debtor].

Order Regarding Second Motion for Discovery Sanctions, 2:9-16. Consistent with the sanctions order, I will draw all inferences regarding debtor's failure to produce the rental agreement for the Idaho property against debtor.[12]

At trial, debtor testified that there was a written rental agreement, but that, "regrettably," he had not been able to find that agreement.

I do not believe debtor's explanation. Debtor's failure to produce the rental agreement cannot be viewed in isolation. Instead, it must be considered in light of the numerous wrongful acts and omissions involving the Idaho property discussed at length above. I find that debtor knowingly and fraudulently refused to produce the rental agreement for the Idaho property as part of his scheme to shield the rental income from his creditors and the trustee.

---

[12] A negative inference would be warranted even in the absence of the sanctions order. "The failure of a party to provide evidence peculiarly available to that party supports the inference that the truth would be damaging to that party." Barry Russell, BANKRUPTCY EVIDENCE MANUAL § 301.1 (2003).

For the reasons set forth above, debtor will be denied a discharge under § 727(a)(2)(A) and (B) and (4)(A) and (D).

2. Zions Bank Account

On November 14, 2001, approximately one month before debtor filed his chapter 7 petition, he opened a personal bank account at Zions First National Bank in Utah ("the Zions bank account"). Exhibit 28. The account was opened with a $125,000 deposit.[13] Debtor listed the Zions bank account as a closed account in response to question 11 of his statement of financial affairs.

At trial, debtor testified he was under various personal and financial pressures in November of 2001. Chief among the financial pressures was the threat of multiple lawsuits. According to debtor's testimony, at least one lawsuit was actually filed in November of 2001. Debtor testified that he was particularly concerned with one set of plaintiffs who were represented by attorney Gary Berne. Debtor admitted in his trial testimony that he moved the funds to the Zions bank account to prevent the prejudgment attachment of those funds by the plaintiffs represented by Mr. Berne.

[13] The statement for the Zions bank account shows a deposit of $100,000 on November 21, 2001. The trustee does not dispute debtor's testimony that this entry was a mistake.

Debtor's discharge will be denied under § 727(a)(2)(A), because he transferred and concealed the $125,000 deposited into the Zions bank account with the intent to hinder and delay his creditors.[14]

Debtor argues that his movement of funds to the Zions bank account does not qualify as a transfer under § 727(a)(2)(A), because he retained title to the funds and did not transfer them to a third party. According to debtor, § 727(a)(2) does not apply unless a debtor divests himself of title to or possession of the property in question. That is not the law.

The Bankruptcy Code defines a transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . . [.]" § 101(54).

> Under this definition, any transfer of an interest in property is a transfer, including a transfer of possession, custody or control, even if there is no transfer of title, because possession, custody and control are interests in property. A deposit in a bank account or similar account is a transfer.

6 King, COLLIER ON BANKRUPTCY ¶ 727.02[5] (Rev. 2003)(citing In re Bernard, 96 F.3d 1279, 1282 (9th Cir. 1996)). In Bernard, the Ninth Circuit held that the debtors' movement of funds to evade attachment qualified as a transfer under the Bankruptcy Code's extremely broad definition of that term, and warranted the denial of discharge under

---

[14] Because I have decided that debtor will be denied a discharge under § 727(a)(2), I need not decide whether the trustee has established that debtor should be denied a discharge under § 727(a)(3), (4) and (5) in connection with the Zions bank account.

§ 727(a)(2), even though the debtors never parted with title to the funds. Debtor's overly restrictive definition of a transfer is also inconsistent with the Ninth Circuit's position that "lack of injury to creditors is irrelevant for purposes of denying a discharge in bankruptcy." In re Adeeb, 787 F.2d 1339, 1343 (9th Cir. 1986).[15]

Debtor also argues that § 727(a)(2) does not apply, because the plaintiffs represented by Mr. Berne did not have a judgment against him when he transferred the funds to the Zions bank account. I reject this argument. The record is clear that, at the time of the transfer, debtor was aware of and motivated by what he considered to be the imminent and inevitable prejudgment attachment of his assets by the plaintiffs represented by Mr. Berne. Those plaintiffs' claims arose prepetition, making them creditors under the Bankruptcy Code's broad definition.[16] See In re Olivier, 819 F.2d 550, 552-53 (5th Cir. 1987)(debtors' transfer of house after auto accident but before entry of judgment was a transfer with intent to hinder

---

[15] Even if the deposit of funds into the Zions bank account did not qualify as a transfer under § 727(a)(2), which it surely does, it would constitute concealment under that provision. Debtor admitted at trial that he moved the funds to hide them from the creditors represented by Mr. Berne.

[16] A creditor is defined under the Bankruptcy Code as an "entity that has a claim against the debtor that arose at the time of or before the" petition date." § 101(10)(A). A claim is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" § 101(5)(A).

creditor within the meaning of § 727(a)(2), because the claim arose when the accident occurred).

I find that debtor acted with the intent to hinder and delay his creditors when he transferred the funds to the Zions bank account. Denial of discharge under § 727(a)(2) "need not rest on a finding of intent to *defraud*. Intent to hinder or delay is sufficient." Bernard, 96 F.3d at 1281 (original emphasis). While direct proof of the requisite intent under § 727(a)(2) is rare, it is present in this case. Debtor admitted in his trial testimony that he opened the Zions bank account to prevent the prejudgment attachment of those funds.[17]

Debtor argues that he lacked the requisite intent, because he was trying to prevent one set of creditors from attaching his assets, thereby insuring that those assets would be available for equal distribution among all his creditors. There are two problems with this argument.

---

[17] Because debtor admitted that he intended to hinder and delay his creditors, I need not consider whether there is circumstantial evidence of the requisite intent. In re Adeeb, 787 F.2d 1339, 1343 (9th Cir. 1986). However, even if debtor had not admitted that he acted with the intent to hinder and delay his creditors, I could infer such intent from the circumstances of this case. The transfer of funds to the Zions bank account is marked with more than one badge of fraud. The transfer occurred shortly before debtor filed his chapter 7 petition and it was a transfer in anticipation of a lawsuit. In addition, the circumstances of the transfer are suspicious, and debtor has failed to produce any "explanatory or rebutting evidence." In re Titus, 75 B.R. 256, 259 (Bankr. W.D. Mo. 1985)(quoting Allison v. Mildred, 307 S.W.2d 447, 453 (Mo. 1957)).

First, debtor has admitted that he transferred the funds to hinder or delay certain creditors. That is sufficient to deny his discharge under § 727(a)(2). The Ninth Circuit has addressed and rejected debtor's argument. In Adeeb, the court stated that the debtor in that case was

> mistaken in his assertion that he lacked actual intent because he intended to protect some of his creditors. Our inquiry under section 727(a)(2)(A) is whether [the debtor] intended to hinder or delay a creditor. If he did, he had the intent penalized by the statute notwithstanding any other motivation he may have had for the transfer.

787 F.2d at 1343.

The other problem with debtor's argument is that it is not believable. There is no evidence that any of the funds in the Zions bank account were secured for equal distribution among debtor's creditors. Instead, debtor distributed all of the funds in the Zions bank account for his own benefit shortly before he filed his chapter 7 petition.

On November 21, 2001, Debtor paid $120,000 out of the Zions bank account in the form of prepetition attorney retainers. Exhibit 28. On that same date, he transferred $3,500 to Chase Hamilton & Company ("CHC"). Exhibit 28. Debtor is a shareholder in CHC. Exhibit 58, 12:14-15. Also, on December 5, 2001, debtor transferred $1,492.29 to the Rencher Law Firm ("the RLF"). Exhibit 28. Debtor was an employee of the RLF and owned eighty percent of the RLF through the Guy B. Rencher, II, P.C. Exhibit 57A, 11:3-10. Debtor's explanation that he opened the Zions bank account to preserve the funds for the benefit of all of his prepetition

creditors is simply is not supported by the evidence. See In re Martin, 88 B.R. 319, 323 (D. Colo. 1988)(rejecting similar explanation as "pretextual" where debtor failed to identify other creditors or show "that his obligation to them arose prior to the time he purportedly made the payments to them").

For the reasons set forth above, debtor will be denied a discharge under § 727(a)(2) in connection with the Zions bank account.

3. Undisclosed Transfers from Debtor's Personal U.S. Bank Account Number 153601176321 ("the 6321 account")

Debtor testified at trial that the 6321 account was a personal checking account he owned jointly with his wife. Question 3a of the statement of financial affairs requires that a debtor "[l]ist all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within 90 days" before the petition date. Exhibit 55. Question 3b requires the disclosure of "all payments made within one year immediately preceding the commencement of [the] case to or for the benefit of creditors, who are or were insiders." Id.

There were a number of prepetition transfers from the 6321 account that debtor was required to disclose in his statement of financial affairs. Because debtor made material false oaths by

knowingly and fraudulently failing to do so, he will be denied a discharge under § 727(a)(4)(A).[18]

a. Undisclosed Transfers to Insiders Within One Year of the Petition Date

(1) Transfers to CHC and Chase Hamilton Management ("CHM)"

Debtor was the manager of CHM. Exhibit 58, 10:19. Debtor testified at trial that CHM was wholly owned by CHC and that he was a fifty percent shareholder in CHC. Debtor also testified that he was an officer and director of CHC. Debtor conceded in the PTO that CHC and CHM are insiders. See PTO, ¶ 3H.

The evidence introduced at trial establishes the following transfers from the 6321 account within one year of the petition date:

1. A December 28, 2000 transfer of $149,018.78 to CHC. Exhibit 5.

2. A January 17, 2001 transfer of $196,500 to CHM. Exhibit 8.

3. A February 6, 2001 transfer of $134,500 to CHM. Exhibit 10.

4. A March 7, 2001 transfer of $167,500 to CHM. Exhibit 12.

For each of the four above-referenced transactions, the register for the 6321 account, Exhibit 9, shows a prior deposit of

---

[18] Because I have decided that debtor will be denied a discharge under § 727(a)(4), I need not decide whether he should be denied a discharge under § 727(a)(2) and (3) in connection with the 6321 account.

funds into the 6321 account from CHC or CHM. The funds deposited would be held in one or more of debtor's personal accounts and eventually paid back out to CHC or CHM via the transfers set out above.[19]

Debtor's wife testified that she prepared and maintained the register for the 6321 account and wrote most of the checks from that account.[20] Prior to trial, debtor's wife characterized these transactions as loans. See Exhibit 63, 78:13-19 (December 28, 2000 transfer); 86:25 - 87:15 (January 17, 2001 transfer); 95:23 - 96:8 (February 6, 2001 transfer); and 99:20 - 100:5 (March 7, 2001 transfer). At trial, debtor's wife tried to back away from this characterization, saying that she viewed them as loans for bookkeeping purposes only and that she was not sure of their true nature.

While debtor acknowledges that he was obligated to return the funds to CHC and CHM, and that he and his wife obtained the benefit of any interest earned to the extent the funds resided in their personal interest-bearing bank accounts, debtor insists that these

---

[19] These four transfers are similar to numerous other transactions discussed at great length during the trial. For reasons that were not explained at trial, large sums of money were moved among various accounts belonging to debtor and entities with which debtor had a connection. While debtor's witnesses were often able to trace the movement of funds among the various accounts, their ability to do so is not determinative of the issue before me, which is whether debtor knowingly and fraudulently made material false oaths when he failed to disclose the transfers.

[20] Debtor has never argued that any distinction should be made between checks he signed and those signed by his wife.

transactions cannot be characterized as loans. Instead, he maintains that he was simply holding the funds for CHC and CHM. As a result, debtor claims that he did not have to disclose the transfers set out above because CHC and CHM were not his creditors. Debtor also argues that he did not need to disclose the transfers, because they were ordinary course transactions and thus the trustee could not have recovered the payments as preferential transfers under § 547.

(2) Transfers to the RLF

Debtor conceded in the PTO that the RLF is an insider. See PTO, ¶ 3H. Between December 28, 2000 and December 4, 2001, a total of $157,470.94 was transferred to the RLF from the 6321 account. Exhibits 6-7, 11 and 13-20. Debtor claims that the transfers represented in exhibits 7 and 13-20, which total $51,739.95, were to reimburse the RLF for debtor's personal credit card charges. Tammy Jackson is debtor's former bookkeeper. Ms. Jackson, who I find to be credible, testified that it was a regular practice for the RLF to pay debtor's credit card bills and then to receive reimbursement from debtor for the personal charges. She also testified that the transfers represented in exhibits 7 and 13-20 were reimbursement of personal charges paid by the RLF. Debtor is unable or unwilling to explain the purpose of the other two transfers represented in exhibits 6 and 11, which total $105,730.99.

Debtor maintains that, to the extent the transfers to the RLF were for reimbursement of personal credit card charges paid by the firm, he did not disclose those payments because he considered them to be payments to the credit card companies, not transfers to the

RLF.[21] According to debtor, he did not consider the RLF to be his creditor and did not disclose the transfers for that reason. He also attempts to justify his nondisclosure by stating that the payments could not have been recovered as preferential transfers, because they were not on account of antecedent debt and were transfers in the ordinary course.

b. Undisclosed Transfers Within 90 days of the Petition Date

The following payments were made from debtor's 6321 account within 90 days of the petition date, but were not disclosed in debtor's statement of financial affairs:

1. An October 23, 2001 payment to Aarons International, a clothier, in the amount of $1,452.00. Exhibit 30.

2. A November 19, 2001 payment to Dr. James Kilgore in the amount of $4,000. Exhibit 3.

3. A November 27, 2001 payment to Douglas Klein, DDS, in the amount of $1,814.40. Exhibit 4.

Debtor maintains that he did not disclose these transfers because, for various reasons, the trustee would not have been able to recover the transfers as preferential transfers.

---

[21] In response to question 3a of the statement of financial affairs, debtor stated that he made payments to American Express and Citibank totaling $20,037 in the 90 days preceding the petition date. He did not, however, disclose that those payments were made through the RLF.

c. Analysis of Undisclosed Transfers

Debtor made a false oath relating to a material fact when he failed to disclose in his statement of financial affairs the transfers to insiders and non-insiders from the 6321 account within one year of the petition date discussed above. The omissions detrimentally affected administration of debtor's estate, because they hindered the trustee's efforts to fully investigate debtor's pre-bankruptcy dealings. In addition, the omissions were material, because they interfered with the possibility of preference or fraudulent transfer actions. See Wills, 243 B.R. at 63; In re Mathis, 258 B.R. 726, 736 (Bankr. W.D. Ark. 2000).

Debtor appears to argue that the false oaths were not material because, for various reasons, the transfers ultimately would not have been recoverable by the trustee as preferential transfers under § 547.

There is an easy answer to debtor's contention. Whether the transfers were avoidable and thus recoverable for the benefit of the estate is for the trustee to decide, not debtor. See In re Haverland, 150 B.R. 768, 772 (Bankr. S.D. Cal. 1993)("The determination of whether property has value for the estate is not for the debtor to make."). The purpose of § 727(a)(4) "is to insure that those interested in the case, in particular the trustee, have accurate information upon which they can rely without having to dig out the true facts or conduct examinations." In re Coombs, 193 B.R. 557, 563 (Bankr. S.D. Cal. 1996)(quoting In re Lunday, 100 B.R. 502, 508 (Bankr. D. N.D. 1989)). "Neither the trustee nor the creditors

should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight." In re Tully, 818 F.2d 106, 110 (1st Cir. 1987). Unfortunately, that is precisely what has happened in this case. The time spent and expense incurred by the trustee is a textbook illustration of the importance of full disclosure.

I also find that debtor knowingly and fraudulently failed to disclose the transfers from the 6321 account. Debtor intentionally omitted information about the transfers from his statement of financial affairs as part of his scheme to control access to information about his financial and business dealings. The omissions are part of a continuing pattern of wrongful behavior indicating fraudulent intent. At the very least, the omissions are evidence of a reckless indifference to the truth and the importance of full disclosure.[22] There are several badges of fraud present. In terms of both number and dollar amount, most of the undisclosed transfers from the 6321 account involved transfers to insiders of debtor. In addition, debtor has not satisfactorily explained the purpose of most of the transfers, nor has he offered any explanation

[22] Further evidence of debtor's reckless indifference to the truth is his failure to amend his statement of financial affairs to fully remedy the omissions. In re Tully, 818 F.2d 106, 111 (1st Cir. 1987). Shortly before the trial, debtor amended his response to question three of the statement of financial affairs to state that two credit cards "may have been paid through" the RLF. Exhibit 57 at 10. Debtor did not address, much less correct, any of the other omissions discussed above.

for the highly unusual manner in which he conducted his business affairs.

Debtor maintains that he did not disclose the transfers to CHC, CHM and the RLF, because he did not believe those entities were his creditors. Debtor's explanation defies belief. With regard to the transfers to CHC and CHM, debtor admitted in his testimony that he had to return the funds he was allegedly holding for those entities. CHC and CHM therefore had a right to repayment while debtor had possession of the funds. That is sufficient to make CHC and CHM creditors. The same is true of the payments to the RLF. The evidence is that, for some of the transfers, the RLF paid personal credit card charges on behalf of debtor and that debtor was obligated to reimburse the RLF. Thus, the RLF was a creditor and the transfers should have been disclosed in response to question 3b of the statement of financial affairs. With regard to the payments to the RLF for which debtor offers no explanation, in the absence of evidence to the contrary, I infer from the payment and other facts discussed that debtor owed those funds to the RLF, for whatever reason, and that the RLF thus was a creditor of debtor's.[23]

For the reasons set forth above, debtor will be denied a discharge under § 727(a)(4)(A) for knowingly and fraudulently failing to disclose prepetition transfers from the 6321 account.

---

[23] Debtor does not argue that any of the payments to the RLF were gratuitous transfers. If they were, they should have been disclosed in response to question 7 of the statement of financial affairs, which generally requires disclosure of all gifts made within one year of the petition date.

4. Failure to Disclose Closed Bank Account

Question 11 of the statement of financial affairs requires the disclosure of all accounts held in the name of the debtor or for the benefit of the debtor that were closed within one year preceding the petition date. Debtor listed only one closed account in his statement of financial affairs, the Zions bank account. He should have listed one other, U.S. Bank account number 153691612938 ("the 2938 account"), and will be denied a discharge under § 727(a)(4)(A) for failing to do so.[24]

The 2938 account was held in debtor's name and closed on December 6, 2001. Exhibit J. Debtor testified that the funds in this account belonged to the RLF and that he held the account only as a nominee. Ms. Jackson testified that she balanced the books for this account and that debtor never used the funds for personal expenditures. This testimony is in direct conflict with debtor's representation in an April 2001 loan application that he owned the account. See Exhibit 64. There are only two possible explanations for the discrepancy. Either the funds did not, in fact, belong to

---

[24] The 2938 account is the same as one of the accounts discussed in section III.B. of this memorandum opinion.

The trustee also alleges that debtor should be denied a discharge for making a false oath by failing to disclose the other account discussed in section III.B. of this memorandum opinion, US Bank account number 153691137340 ("the 7340 account"), as a closed account in his statement of financial affairs. I will not deny debtor's discharge based on his failure to disclose the 7340 account. The account was not held in debtor's name and the trustee has not established that it was held for his benefit.

debtor and he lied on the loan application, or they did belong to him, and he lied when he failed to disclose that fact in his bankruptcy.

I need not decide whether debtor or the RLF owned the funds in the 2938 account to rule on the trustee's claim for denial of discharge. Even assuming that debtor did not own the funds in the 2938 account, he should have disclosed that account in his statement of financial affairs. The 2938 account should have been disclosed because it was closed within one year of the petition date and was titled in debtor's name. There is no question that debtor understood that he was required to disclose all property for which he held legal title, even if he believed that he did not have a beneficial ownership interest in the asset. See Exhibit 57A, 53:12-14.

Debtor's false oath with regard to the 2938 account is material, because it bears a relationship to debtor's business transactions and concerns the discovery of his business dealings.

I also find that debtor knowingly and fraudulently failed to disclose the 2938 account. Debtor has not come forward with any convincing explanation for his failure to disclose the account. I am thus left with the inescapable conclusion that he did so as part of his scheme to deny access to information about his overall financial situation and business dealings.[25]

---

[25] Because I have decided that debtor will be denied a discharge under § 727(a)(4)(A), I need not decide whether he also

(continued...)

IV. CONCLUSION

For the reasons set forth above, debtor will be denied a discharge under § 727(a)(2)(A) and (B) and (4)(A) and (D). Counsel for the trustee shall submit a judgment within ten days.

ELIZABETH L. PERRIS
Bankruptcy Judge

cc: Sally R. Leisure
Robert L. Carlton
United States Trustee
Daniel H. Rosenhouse
Gary I. Grenley
Robert S. Banks, Jr.

[25](...continued)
should be denied a discharge under § 727(a)(2),(3) or (5) in connection with the 2938 account.